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No. 233

In the Supreme Court of the United States

OCTOBER TERM, 1955

DIXIE CARRIERS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

Appellee United States of America is of the view that the decision below, upholding an order of the Interstate Commerce Commission, is erroneous. It therefore submits this brief in support of reversal.

OPINION BELOW

The opinion of the district court (R. 45) is reported in 129 F. Supp. 28. The report of Division 3 of the Interstate Commerce Commission (R. 21) appears in 287 I. C. C. 403, and the report of the full Commission on reconsideration (R. 29) appears in 291 I. C. C. 422.

JURISDICTION

The judgment of the district court was entered on February 16, 1955 (R. 55), and a timely motion for new trial (R. 56) was denied on March 28, 1955 (R. 60). Notice of appeal was filed on May 17, 1955 (R. 1), and probable jurisdiction was noted on October 10, 1955 (R. 152). The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U. S. C, 1253 and 2101 (b).

QUESTIONS PRESENTED

The combination all-rail rate on sulphur from mines near Galveston, Texas, to Danville, Illinois, is substantially *higher* than the combination rail-barge rate for the same journey. The railroads, however, maintain a joint all-rail rate which is substantially *lower* than the rail-barge combination rate, but have refused to establish a comparable rail-barge through route and joint rate. The result has been to eliminate the barges from carrying this traffic. The questions presented are:

1. Whether, under such circumstances, the Interstate Commerce Act requires the Commission to establish through routes and joint rates for rail-barge transportation, in order to effectuate the National Transportation Policy that the Act be administered so as to preserve the "inherent advantages" of each form of transportation.

2. Whether the railroads' refusal to establish joint rates with the connecting barge lines, while maintaining such rates with the connecting rail lines, constitutes a discrimination in rates between connecting lines prohibited by Section 3 (4) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, 54 Stat. 898, as amended, 49 U. S. C. 1. *et seq.*, are as follows:

THE NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate

to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. [49 U. S. C. preceding Sec. 1]

Section 1 (4): * * * it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. * * * [49 U. S. C. 1 (4)]

Section 3 (4): All carriers subject to the provisions of this part * * * shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III. [49 U. S. C. 3 (4)]

Section 15 (3): The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and

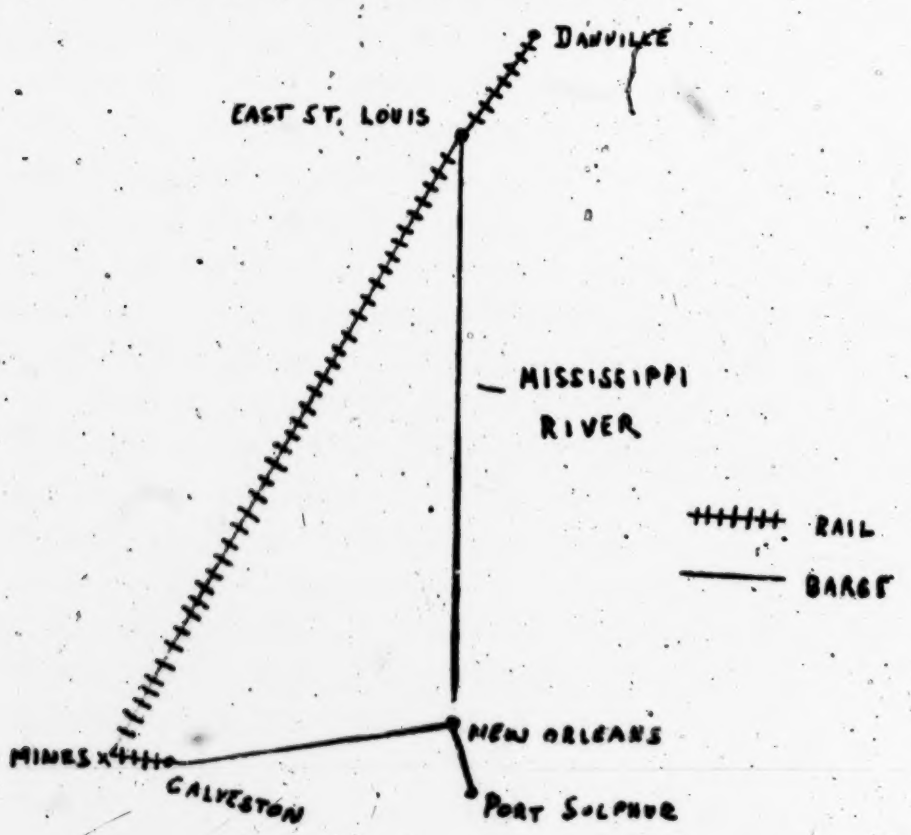
joint rates, fares, or charges, applicable to the transportation of passengers or property * * * by carriers by railroad subject to this part and common carriers by water subject to part III * * * and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * * [49 U. S. C. 15 (3)]

Section 307 (d): The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. * * * [49 U. S. C. 907 (d)]

STATEMENT

This is a direct appeal from the judgment of a three-judge district court affirming an order of the Interstate Commerce Commission. The Commission's order refused to prescribe through routes and joint rates between the appellant water carriers and connecting railroads for sulphur moving from Galveston, Texas, to Danville, Illinois.

The following sketch shows the routes involved in this case (see map, R. 114A):



The facts pertinent to the issues before this Court are as follows:

Sulphur mined in the Galveston area can be shipped to Danville (where a large user of sulphur is located, R. 93) either by rail or by rail and barge (R. 23, 79–80). The rail-barge route is by rail from the sulphur mines to Galveston, by barge from Galveston (via New Orleans) to East St. Louis, Illinois, and then by rail to Danville (R. 23).[1] The total charge for such movement is $9.77 per ton, consisting of rail and loading charges of $1.50 from the mines to Galveston, the barge rate of $5.32 from Galveston to East St. Louis, and the local rail rate of $2.95 from East St. Louis to Danville (R. 23, 84–89, 103–104).

The total of the local rates for all-rail shipments from the mines to Danville is $11.68,[2] which is $1.91 higher than the combination rail-barge rate. The railroads, however, have established a joint all-rail rate of $9.184, which is $2.52 below the combination all-rail rate and .59 below the combination rail-barge rate. During the last six months of 1950, the "preponderance" of sul-

[1] Appellants Dixie Carriers, Inc. and Coyle Lines, Incorporated, provide barge service on the intercoastal canal between Galveston and New Orleans, and appellants Federal Barge Lines, Inc., and American Barge Line Company provide barge service on the Mississippi River between New Orleans and East St. Louis (R. 23). The two groups of carriers join in providing through barge service at joint rates between Galveston and East St. Louis (*ibid.*).

[2] The local rail rate is $8.736 from the mines to East St. Louis, and $2.95 from the latter to Danville (R. 104).

phur traffic from Galveston to Danville moved by rail and barge via a contract barge carrier (R. 24). Since 1951, however, when the contract carrier discontinued operations, all sulphur from Galveston to Danville has moved over the all-rail route (R. 30, 82). Approximately 20,000 tons of sulphur are shipped annually over this route (R. 30, 93).[3]

At the request of a shipper, appellants in 1950 requested the Danville railroads to establish a joint rail-barge rate of $7.67 on sulphur from Galveston to Danville (R. 78, 91–92),[4] but the railroads refused to do so (R. 79). Appellants then filed a complaint with the Interstate Commerce Commission, alleging that the existing rail-barge rates on sulphur were excessive and unreasonable, that it was necessary and desirable in the public interest to establish through rail-

[3] Sulphur is also mined at Port Sulphur, Louisiana, a point approximately 60 miles south of New Orleans. The Danville railroads have joint rates with both the rail carriers and the barge carriers operating out of Port Sulphur. The Port Sulphur-Danville all-rail rate is $9.184, the same as the Galveston-Danville rate (R. 124). The joint barge-rail rate from Port Sulphur to Danville is $6.66 (R. 77–78, 80). The Danville railroads receive a division of $2.26 of the latter rate, as against the local rate of $2.95 (R. 82).

[4] This rate was determined by adding $1.01 to the $6.66 joint rail-barge rate from Port Sulphur to Danville. The $1.01 represents the differential by which barge rates on sulphur from Galveston mines to various points throughout the country traditionally have exceeded such rates from Port Sulphur mines to the same points (R. 78, 92). See *supra*, n. 3.

barge routes and joint rates with reasonable differentials below the all-rail rates, and that the refusal of the railroads to establish such joint rates discriminated against the barges as connecting carriers, in violation of Sections 1 (3), 3 (4) and 307 (d) of the Interstate Commerce Act (R. 62–64). Appellants requested the Commission to establish a through rail-barge route from Galveston to Danville and a joint rate, which they suggested be fixed at $7.67. (See *supra*, n. 4.) They proposed to give the Danville railroads $2.26 as a division of that rate (R. 24, 83), which is the same division the railroads receive of the joint rail-barge rate from Port Sulphur to Danville (see *supra*, n. 3), and appears to be the same as they receive of the all-rail Galveston-Danville rate (R. 129). Under the proposed rate, the cost of rail-barge shipments from the mines to Danville would be $9.17, as against the all-rail rate of $9.184 (R. 81). While ordinarily such a slight differential would not enable the barge carriers to get any traffic, a shipper told appellants that, because of the absorption of part of the barge rate by the Galveston sulphur producers, they would get some business at that rate (R. 81–82, 93, 146).

After hearing the Commission (three commissioners dissenting) dismissed the complaint (R. 29–35, affirming Division 3, R. 22–28). The Commission held (R. 30–31) that since no shipper had evidenced an interest in the rate sought and

since the all-rail rate was on a depressed basis, it could not find that "the public interest requires" the establishment of the joint barge-rail rate sought. It stated (R. 30) that there was "no evidence" to show that a differential between the present joint all-rail rate and the proposed joint rail-barge rate was "required to remove the alleged discrimination against barge lines and to result in rates that would be consistent with the national transportation policy to preserve the inherent advantages of all modes of transportation." The Commission further held (R. 31) that the record afforded no support for the finding that the present combination rail-barge rate was unreasonable. The Commission also rejected the claim of discrimination. Declaring that this claim rests on the fact that "the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on ex-rail traffic moving from the same origin to the same destination," it ruled that divisions of joint rates are not "rates" or "charges" within the meaning of Section 3 (4) (R. 31–32).

On appeal, a three-judge district court upheld the Commission's order dismissing the complaint (R. 45–55). The court held (1) that the Commission's findings were adequate and were supported by the evidence (R. 50), and (2) that, on

its own independent consideration of the record, the court had concluded that establishment of the proposed routes and rates would not be in the public interest, and that the existing rates were not discriminatory (R. 50–52).

SUMMARY OF ARGUMENT

I. The Transportation Act of 1940, which brought water carriers under the general regulatory power of the Interstate Commerce Commission, was the culmination of a long struggle in Congress to compel the railroads to establish through routes and joint rates with connecting barge lines. Without joint rail-barge rates under which the total transportation cost is sufficiently cheaper than all-rail transportation to offset the slower service provided on the barge leg of the journey, the barges will be unable to participate effectively in the national transportation system.

The recent history of rail-barge relationships in this country shows repeated Congressional endeavors to insure joint rail-barge rates which would foster the development of adequate water service. In a series of acts beginning in 1920, Congress directed the Government officials who had charge of operating the federal barge service to establish proper joint rail-barge rates. The final step was the Transportation Act of 1940 which required the Commission, *inter alia*, whenever "necessary or desirable in the public interest," to establish through routes and joint rates

between rail and water carriers, and to prescribe reasonable differentials between such rail-barge rates and all-rail rates.

The 1940 Act also contains a number of provisions designed to prevent the Commission from administering the Act so as to favor railroads over water carriers. The Act's declaration of the National Transportation Policy requires the Commission to administer that Act so as to "recognize and preserve the inherent advantages" of "all modes of transportation" subject to the Act. A number of provisions were designed to preserve the inherent advantages of water transportation, including the amendment of Section 3 (4) to broaden the prohibition against railroads discriminating in "rates, fares, and charges between connecting lines" to include water carriers within the definition of connecting lines.

In *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, this Court interpreted those provisions as invalidating a Commission order which approved higher rail rates for the transportation of grain east from Chicago if it had arrived in Chicago by barge rather than by rail or lake steamer. The Court stated (p. 579) that Congress had "declared in unmistakable terms that the 'inherent advantage' of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge," and had "left the Commission no discretionary power to approve any type of rates which

would reduce the 'inherent advantage' of barge transportation in whole or in part."

Although *Mechling* involved an attempt by the railroads to destroy the barges' "inherent advantage" by *raising* the cost of barge service, the same result could be achieved by *lowering* the cost of all-rail service to the rail-barge level. The legislative history of the 1940 Act shows that Congress also intended to prohibit that possibility. One obvious way in which the railroads can destroy the inherent advantage of barge transportation is by establishing joint rates with a connecting railroad while at the same time refusing to establish such rates with a connecting barge line which competes with the connecting railroad. By thus reducing the all-rail rate to a point equal to or below that of the combination rail-barge rate, the railroads will be able to freeze the barges out of the business—as was done in this case.

We submit that where the railroads' refusal to establish joint rail-barge rates would result in reducing the barges' "inherent advantage," the Commission is required to find that establishment of such rates is "necessary or desirable in the public interest" under Section 307 (d). In this case, the combination rail-barge rate on sulphur of ~~$1.68~~ 1.77 per ton is $1.91 less than the combination all-rail rate of ~~$3.77~~ 3.68, and shippers who would be willing to accept the slower barge service would obtain the benefit of the differential. By

maintaining a joint all-rail rate of $9.184, which is .59 below the rail-barge combination rate, the benefits of the lower cost of barge service have been denied to those who would ship by barge.

The reasons given by the Commission for concluding that establishment of joint rates was not in the public interest—that no shipper testified in support thereof, and that the all-rail rate is on a depressed basis—do not support its action. Where, as here, a joint rate is required to preserve the barges' inherent advantage, it is in the public interest to establish it whether or not shipper witnesses appear. Furthermore, a shipper had advised the barges that under their proposal they would share in the business. The all-rail rate was depressed only because it had been reduced to meet water competition, and the Commission cannot maintain the cost of barge transportation at an arbitrarily high level in order to protect competing railroads. If the barges are willing to carry the traffic at less than the railroads, Congress intended that they should be permitted to do so. Absent exceptional and unusual circumstances, which are not disclosed by this record, the Commission is required to prescribe through rail-barge routes and joint rates whenever their establishment is required to preserve the barges' "inherent advantage."

II. Section 3 (4) of the Act prohibits rail carriers from discriminating in their "rates, fares,

and charges between connecting lines," including water carriers. The Commission repeatedly has held that it is a violation of that provision for a railroad to refuse to establish joint rates with one of two connecting water carriers or with one of two connecting railroads, while maintaining such rates with the other. It is equally discriminatory for a railroad to refuse to establish such rates with a connecting barge line while maintaining them with a connecting railroad which competes with the barge line. Both are connecting carriers, and the economic advantage which a rail carrier gains when the competitor which is discriminated against is a barge line is just as great, if not greater, than when it is another railroad. The statutory prohibition is not restricted to rate discriminations between carriers engaged in the same form of transportation, but forbids discrimination between "all connecting lines."

Since the barge lines proposed to give the railroads the same division out of the proposed joint rail-barge rate which they now receive out of the all-rail rate, establishment of a joint rail-barge rate cannot prejudice them. The railroads have no proper concern with whether the sulphur has reached them by barge or by rail, and they cannot discriminate against the barges merely to protect connecting rail carriers from competition by connecting barge lines. The railroads' refusal to

establish joint rail-barge rates plainly was a discrimination in rates between connecting lines forbidden by Section 3 (4).

ARGUMENT

INTRODUCTION

The Transportation Act of 1940, 54 Stat. 898, which brought water carriers under the general regulatory powers of the Interstate Commerce Commission, was the culmination of a long struggle in Congress to compel the nation's railroads to establish through routes and joint rates with connecting barge lines. Barge transportation, although slower than rail, is also substantially cheaper, and thus is attractive to shippers to whom lower cost is more important than speed. Cf. *Alabama Great Southern Railroad Co.* v. *United States*, 340 U. S. 216, 223. However, since generally only one portion of an interstate journey can be made by barge, the traffic must be interchanged with connecting rail carriers, either at the beginning or at the end of the water trip, or at both points. Under such circumstances, effective participation by barge carriers in our national transportation system depends upon the existence of joint rail-barge rates which are sufficiently cheaper than all-rail transportation to offset the inferior service provided on the barge leg of the journey. For, absent such lower joint

rail-barge rates, the barges will be frozen out of the traffic.[5]

It is our contention that the various provisions of the Transportation Act of 1940 which deal with rail-barge relationships place upon the Commission a clear duty to prescribe through rail-barge routes and joint rates whenever such routes and rates are required to carry out the National Transportation Policy that the inherent advantage of barge transportation (its lower cost) is to be preserved. Although here the *combination* of local rail rates on sulphur from the Galveston mines to Danville is substantially *higher* than the combination of local rail and barge rates, the Danville railroads have established a *joint* all-rail rate which is substantially *lower* than the rail-barge combination rate, but have refused to establish a comparable joint rail-barge rate. As a result, the barges are unable to carry the traffic. We shall argue in Point I that joint rail-barge rates are required to carry out the National Transportation Policy, and that the Commission therefore was required to find under Section 307 (d) that establishment of such rates was "necessary or desirable in the public interest." In Point II, we shall urge that the railroads' refusal to establish joint rates with connecting barges, while maintaining

[5] Thus, an official of one of the appellants testified that there has to be a "substantial difference" between the all-rail rate and the rail-barge rate "in order for the barge carriers to participate in the traffic" (R. 81).

such rates with connecting railroads, constituted a discrimination in rates between connecting lines which is prohibited by Section 3 (4) of the Act. Either ground is sufficient for reversal.

I

SECTION 307 (d) REQUIRED THE COMMISSION TO PRESCRIBE JOINT RAIL-BARGE RATES IN ORDER TO EFFECTUATE THE NATIONAL TRANSPORTATION POLICY THAT THE ACT IS TO BE ADMINISTERED SO AS TO PRESERVE THE "INHERENT ADVANTAGES" OF EACH FORM OF TRANSPORTATION.

A brief summary of the recent history of rail-barge relationships in this country is necessary to an understanding of the statutory issues involved.[6]

By 1918, the movement of freight by water along the Mississippi River and its tributaries had almost disappeared. 270 I. C. C. 594. In 1918 Congress, in attempting to alleviate the war-time transportation shortage, sought to revive such barge service through creation of a federally owned and operated barge-line system. *Ibid.* In Section 6 of the Federal Control Act of 1918 (40 Stat. 451, 455), the President was authorized to spend out of a $500,000,000 appropriation

[6] The history is set forth in considerable detail in the Commission's report in *Rail and Barge Joint Rates*, 270 I. C. C. 591, 594–601, 606–613. The discussion in the text is taken largely from that report. See also the Government's brief in *Alabama Great Southern Railroad Co.* v. *United States*, 340 U. S. 216, Nos. 45–48, October Term, 1950, pp. 5–11.

"such an amount as he may deem necessary or desirable for the utilization and operation of canals, or for the purchase, construction, or utilization and operation of boats, barges, tugs, and other transportation facilities on the inland, canal, and coastwise waterways * * *." The Railroad Administration inaugurated barge service on the Mississippi late in 1918, and the Director General of Railroads published joint rail-barge rates to and from inland points which were lower than the combination of the local rail and barge rates. 270 I. C. C. 597–598.

When wartime control over railroad transportation facilities was terminated by the Transportation Act of 1920, 41 Stat. 456, the experiment of federal barge operation was continued. That Act declared it to be the policy of Congress "to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." Section 500, 41 Stat. 499. The water transportation facilities which the United States had acquired were turned over to the Secretary of War with directions to continue their operation (Section 201, 41 Stat. 458). The Secretary was directed (Section 500, 41 Stat. 499) to investigate "the subject of water terminals, both for inland waterway traffic and for through traffic by water and rail * * * with a

view to devising the types most appropriate for different locations, and for *the more expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail* * * * [and] the existing status of water transportation upon the different inland waterways of the country, with a view to determining * * * *whether the water carriers utilizing such waterways are interchanging traffic with the railroads* * * *." (Emphasis supplied.)

In 1924 the Government's Mississippi River barge operations, which were carried on under the name of "Federal Barge Lines," were turned over to Inland Waterways Corporation, a Government corporation created for that purpose. Inland Waterways Corporation Act, 43 Stat. 360. The Act required the Corporation to continue to carry out the policies laid down in the Transportation Act of 1920.[7]

From 1920 to 1927 efforts were made by Federal Barge Lines to establish through routes and joint rates both by voluntary arrangements with rail carriers and by proceedings before the Commission (270 I. C. C. 598–599). There was much dissatisfaction upon the part of advocates of water transportation with the result of these efforts, and Congress was "urged to provide some

[7] Inland Waterways Corporation continued to operate the federal barge service until 1953, when it sold the operating rights and properties to appellant Federal Barge Lines, Inc. *Federal Barge Lines, Inc., Purchase*, 285 I. C. C. 439.

method of overcoming the reluctance of hostile railroads to establish joint rates with barge lines other than by resort to complaint and hearing under the Interstate Commerce Act" (*id.*, p. 599). In 1928, in response to this appeal, Congress passed the Denison Act (Act of May 29, 1928, 45 Stat. 978). That Act declared it to be the congressional policy to continue the federal barge transportation services until, *inter alia*, "terminal facilities shall have been provided * * * reasonably adequate for joint rail and water service" and "there shall have been published and filed * * * such joint tariffs with rail carriers *as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers*" (45 Stat. 979). (Emphasis supplied.) The Act required the Commission to grant certificates of public convenience and necessity to barge carriers, and to direct all connecting common carriers and their connections to join with certificated water carriers in through routes and joint rates. The Commission also was directed to "fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service" (45 Stat. 980). These provisions "were enacted by Congress in an avowed effort to bring about cooperation on the part of the rail carriers with the water carriers." *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 462.

The final legislative step was the passage of the Transportation Act of 1940, 54 Stat. 898. That Act brought water carriers under the general regulatory scheme of the Interstate Commerce Act. The sections of the Denison Act providing for establishment of joint through routes and rate differentials were replaced by the present Section 307 (d) of the Interstate Commerce Act. That Section directs the Commission, "whenever deemed by it to be necessary or desirable in the public interest," to establish through routes and joint rates between common carriers by water, or between such carriers and carriers by rail, and, in the case of through rail-barge routes, to prescribe "such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water." At the same time, Congress extended the Commission's powers and duties under Section 15 (3) to establish through routes and joint rates between rail carriers to cover such routes and rates between "carriers by railroad * * * and common carriers by water * * *."

In sum, the provisions requiring the Commission to establish joint rail-barge rates in the public interest which Congress added to the Interstate Commerce Act in 1940 were written against the background of a long history of congressional endeavor to insure joint rail-barge rates which would foster the development of adequate rail-barge service.

Another factor which significantly influenced Congress in prescribing the Commission's powers and duties with respect to water transportation was the fear, expressed by proponents of such transportation, that the Commission might exercise its regulatory powers so as to favor the railroads in order to enable them "better to compete with inherently cheaper water transportation." *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 575.[8] As this Court there pointed out (*ibid.*), the legislative history of the 1940 Act shows that "[t]hese opponents were repeatedly assured by sponsors of the 1940 Act who advocated Commission regulation of water transportation that the questioned legislation unequivocally required the Commission to fix rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service."[9]

The 1940 Act contains a number of provisions whose "prime purpose * * * is to protect the water carrier's natural advantages." *Id.*, p. 576. The Act's declaration of the National Transportation Policy requires the Commission to admin-

[8] Proponents of water transportation had accused the Commission of pro-railroad bias during the hearings on the 1940 Act. See *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 698 (dissenting opinion of Mr. Justice Black).

[9] The legislative history is fully set forth in the brief of the United States in that case, No. 72, October Term, 1946, pp. 16–26.

ister the Act so as to "recognize and preserve the inherent advantages" of "all modes of transportation subject to * * * this Act." In order to preserve the inherent advantages of water transportation, Congress provided in Section 305 (c) that differences in rates and practices of a water carrier in respect to water transportation from those of a rail carrier with respect to rail transportation shall not constitute "unjust discrimination" or an "unfair or destructive competitive practice." Section 307 (f), requiring the Commission, in fixing rates, to consider "the effect of rates upon the movement of traffic by the * * * carriers for which the rates are prescribed," emphasized that the Commission must consider in fixing rates "* * * the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service * * *." Furthermore, Section 3 (4) of the Act, which forbade carriers to "discriminate in their rates, fares, and charges between * * * connecting lines," 41 Stat. 479, was amended by the 1940 Act specifically to include water carriers, such as appellants, within the definition of connecting carriers. 54 Stat. 898, 903–904, 49 U. S. C. 3 (4). By these provisions, Congress "has declared in unmistakable terms that the 'inherent advantage' of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge." *Mechling* case, *supra*, p. 579.

In the *Mechling* case this Court interpreted those provisions as invalidating a Commission order which, by permitting discriminatory rate increases on barge traffic, would have denied shippers the inherent advantage of the lower cost of water transportation. The order approved higher rail rates for the transportation of grain east from Chicago if it arrived at Chicago by barge rather than by rail or lake steamer. The grain was reshipped from Chicago to the east under a "proportional" rate which was lower than the "local" rate for shipments to the east which originated in Chicago.[10] The Court held (p. 577) that the pertinent provisions of the Interstate Commerce Act "flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport," and that Congress "has declared in unmistakable terms that the 'inheren advantage' of the lower cost of barge carriage as ompared with that of railroads must be passed on to those who ship by barge" (p. 579). It rejected the Commission's "assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations if accomplished by through rates" (p. 577), since "Congress left the Commission no

[10] The proportional rate previously had been the same for ex-barge and ex-rail grain.

discretionary power to approve any type of rates which would reduce the 'inherent advantage' of barge transportation in whole or in part" (p. 579).

In the *Mechling* case, the railroads attempted to destroy the "inherent advantage" of water transportation by *raising* the cost of barge-rail transportation to that of all-rail service.[11] But the same result could be achieved by *reducing* the cost of all-rail service down to the level of the barge-rail rates. That Congress was aware of this possibility, and also intended to prohibit it, is shown by the following colloquy during the debate on the floor of the Senate between Senator Wheeler, who was in charge of the bill, and Senator Norris (84 Cong. Rec. 5874):

> Mr. NORRIS. Suppose, however, this bill should become a law, and an article of freight were to be transported which admittedly could be carried by water better than by railroad, and suppose the railroad should undertake to reduce its rate down to the water rate: Would there be anything in the law to prevent the railroad from doing that?
>
> Mr. WHEELER. Of course there would be.
>
> Mr. NORRIS. Disastrous rates can be brought about by reducing them just as

[11] Cf. *Tennessee Valley Authority* v. *United States*, 96 F. Supp. 409 (N. D. Ala.), where the court, in reliance on *Mechling*, set aside a Commission order permitting railroads to make higher charges for switching services on ex-barge traffic than on ex-rail traffic.

well as by increasing them, as a matter of fact.

Mr. WHEELER. Exactly.

Mr. NORRIS. And the water carrier ought to be protected on the freight that ought to be carried by water rather than on the railroad.

Mr. WHEELER. It would be absolutely protected under this measure.

Mr. NORRIS. That is what I want to see done.

Mr. WHEELER. There is not any question about it. Under the rate-making provision and under the other provisions I have read, there is not any question about it.

One obvious way by which railroads can destroy the "inherent advantages" of barge transportation is through establishing joint rates with a connecting rail carrier while at the same time refusing to establish such rates with a connecting barge carrier which competes with the connecting railroad. If, as in this case, the railroads fix a joint all-rail rate which is substantially lower than the combination rail-barge rate between the same points, the inevitable consequence will be to freeze the barges out of the traffic.[12] The 1940 Act was intended not only to preserve "the inherent advantages of each mode of transportation," but also to "eliminate destructive competition * * * between or among the different forms of carriage." *Eastern-Central Motor Carriers Association* v.

[12] See *supra*, n. 5.

United States, 321 U. S. 194, 206. Indeed, since barge transportation frequently, if not usually, covers only one segment of the journey, the failure of the railroads to establish non-discriminatory joint rates with barges could seriously impede the development and preservation of barge service as a vital component of "a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense" (National Transportation Policy).

Section 307 (d) directs the Commission, "whenever deemed by it to be necessary or desirable in the public interest," to establish through routes and joint rates applicable to the transportation of passengers or property by common carriers by water and carriers by railroad. The National Transportation Policy, which is the "Commission's guide to 'the public interest'" (*McLean Trucking Co.* v. *United States*, 321 U. S. 67, 82), prohibits the Commission from approving "any type of rates which would reduce the 'inherent advantage' of barge transportation in whole or in part" (*Mechling* case, *supra*, p. 579). By refusing to require the Danville railroads to establish joint rates with appellants, the Commission has sanctioned a rate structure which completely eliminates the barges from carrying sulphur from the Galveston mines to Danville. Under such circumstances, we submit, the Commission was re-

quired to find that it was "necessary or desirable in the public interest" that joint barge-rail rates should be established, and reasonable differentials fixed, in order that appellants may participate in this traffic upon fair terms.

Absent the joint all-rail rate, the rail-barge combination rate for sulphur would be $1.91 per ton less than the all-rail combination rate between the same points. ($9.77 as against $11.68, see *supra*, p. 7). This differential reflects the lower cost of the barge leg of the journey, and shippers who would be willing to accept the slower barge service would gain the advantage of this lower cost. The joint all-rail rate of $9.184, however, is .59 below the combination rail-barge rate.[13] The result of the railroads' refusal to establish a comparable joint rate with appellants has been that although the barge leg of the journey costs substantially less than the rail leg, the barges have been unable to participate in this traffic and "those who ship by barge" have been denied "the 'inherent advantage' of the lower cost of barge carriage" (*Mechling* case, *supra*, p. 579).[14] By refusing to prescribe joint

[13] Contrary to the Commission's view (R. 30), the proper comparison is between the rail-barge rate from the mines of $9.77 and the all-rail rate therefrom of $9.184, and not between the latter figure and the rail-barge rate from Galveston of $8.27. It costs $1.50 to transport the sulphur from the mines to Galveston and to load it on the barges there.

[14] Cf. *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, where the Court, in upholding a Commission order directing railroads to interchange cars with Seatrain Lines, the only

rail-barge rates under such circumstances, the Commission has failed to effectuate the congressional policy that the Act "must be so administered as to preserve, not eliminate or reduce the disparity" between rail-barge rates and all-rail rates which the "inherent cheapness of the barge leg of the through route produces" (*id.*, p. 580).

The Commission's holding that establishment of a joint rail-barge rate was not required by the public interest rested on two grounds: (1) that no shipper had evidenced any interest in the rate sought, and (2) that the rate over the all-rail route which it was intended to meet is on a depressed basis (R. 31; see R. 26). But, as we have pointed out, the "public interest" standard in Section 307 (d) embodies the National Transportation Policy. Where, as here (*supra*, pp. 7–8), the effect of the railroads' refusal to establish joint rail-barge rates has been to deny shippers the benefit of low cost barge service, it is in the public interest to correct that situation, whether or not shipper witnesses appear and testify in support of the complaint. Indeed, Section 307 (d) provides for Commission action either upon complaint or upon its own initiative. Moreover, although no shipper appeared, the record shows that a shipper had advised appel-

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one of twelve connecting water carriers with which they refused to do so, pointed out (p. 617) that "[t]he 'inherent advantages of this service' would be lost to the public without railroad car interchange."

hants that under the proposed rail-barge rate they would share in the traffic (*supra*, p. 9).[15]

Nor does the fact that the all-rail joint rate is on a depressed basis justify the Commission's failure to find that prescription of a joint rail-barge rate is in the public interest. As the Commission recognized (R. 27, 32) and the railroads conceded (R. 96), the rail rate was depressed only because it had been reduced to meet water competition. The Commission cannot maintain barge rates at an arbitrarily high level in order to protect competing rail carriers. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282. If the barges are willing to carry the traffic for less than the rails, Congress intended that they should be permitted to do so, and the Commission cannot deny shippers the inherent advantage of barge transportation by refusing to establish joint rail-barge rates which are necessary to enable the barges to carry the traffic. *Alabama Great Southern Railroad Co.* v. *United States*, 340 U. S. 216. If the rail rate is unreasonably low, the Commission has power under other sections of the Act to increase it to a proper level. But the Commission has no

[15] We also note that the Galveston Chamber of Commerce intervened in the proceedings in support of the complaint, alleging that the railroads' refusal to establish joint rail-barge rates would result in a diversion of sulphur traffic to all-rail routes and thereby adversely affect its interests (R. 64, 66).

power to sanction a rate structure which is designed to, and does, free the railroads from competition by other means of transportation.

We think that, absent exceptional and unusual circumstances—and no such circumstances are shown on this record—, the Commission is required to prescribe through rail-barge routes and joint rates whenever their establishment is necessary to preserve the barges' "inherent advantage." "Congress left the Commission no discretionary power to approve *any type of rates* which would reduce the 'inherent advantage' of barge transportation *in whole or in part*" (*Mechling* case, *supra*, p. 579). (Emphasis added.)

Section 307 (d) also requires the Commission to fix "reasonable differentials" between joint rail-barge rates and all-rail rates. Since the amount thereof is, in the first instance, for the Commission to determine, we do not discuss what would be a reasonable differential in this case. We do note, however, that the differential must be adequate to preserve the "inherent advantage" of barge transportation, *i. e.*, it must fully reflect and pass on to the shipper the lower cost of the barge segment of the journey.

II

THE RAILROADS' REFUSAL TO ESTABLISH JOINT RATES WITH THE BARGE LINES, WHILE MAINTAINING JOINT RATES WITH CONNECTING RAILROADS WHICH COMPETE WITH THE BARGE LINES, CONSTITUTED A DISCRIMINATION IN RATES BETWEEN CONNECTING LINES PROHIBITED BY SECTION 3 (4) OF THE INTERSTATE COMMERCE ACT

Section 3 (4) of the Act prohibits rail carriers from discriminating in their "rates, fares, and charges" between connecting lines, including water carriers. We think that the refusal of rail carriers to establish joint rates with connecting water carriers, while maintaining such rates with connecting rail carriers which compete with the water carriers, plainly constitutes a discrimination in "rates" between connecting lines which is prohibited by Section 3 (4).

The Commission repeatedly has held that the refusal of a rail carrier to establish joint rates with one connecting water carrier while maintaining such rates with another, or to establish joint rates with one connecting rail carrier while maintaining such rates with another, constitutes an illegal discrimination between connecting lines.[16]

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[16] Water carriers: *Decatur Navigation Company* v. *Louisville & Nashville RR. Co.*, 31 I. C. C. 281; *Pacific Navigation Co.* v. *Southern Pacific Co.*, 31 I. C. C. 472; *White Star Line* v. *NYC RR. Co.*, 83 I. C. C. 473. Rail carriers: *Ann Arbor RR. Co.* v. *B & O RR. Co.*, 136 I. C. C. 578; *Alabama, Tennessee & N. RR. Corp.* v. *Southern Ry. Co.*, 148 I. C. C. 708; *Denver & RGW R. Co.* v. *Union Pacific R. Co.*, 287 I. C. C.

We submit that it is equally discriminatory for a railroad to refuse to establish joint rates with a connecting barge line while maintaining such rates with a connecting railroad. Both are connecting carriers. The statutory prohibition is not limited to rate discriminations between carriers engaged in the same form of transportation, but forbids discrimination between all "connecting lines." The plain purpose of the provision is to prevent a rail carrier from giving one of its connecting carriers a competitive advantage over another.

A rail carrier gains the same unfair competitive advantage whether its competitor which is being discriminated against is another railroad or a water carrier. Indeed, the competitive advantage to a railroad may be even greater when the competing connecting carrier is a barge line which otherwise would be able to provide cheaper service to the public. In the light of the history of congressional concern over the railroads' refusal to establish joint rates with barge lines (see *supra*, pp. 18–22), we think that when Congress in 1940 amended Section 3 (4) specifically to include water carriers within the category of connecting carriers, it clearly intended to prohibit railroads which had joint rates with connecting rail carriers from discriminatorily refusing to establish joint rates with connecting water carriers.

611, 658–660, affirmed on this issue *sub nom. Union Pacific Railroad Company* v. *United States*, 132 F. Supp. 72 (D. Neb.), pending on appeal, Nos. 117–119, this Term.

Since appellants proposed to give the railroads a division out of the joint rail-barge rate identical to that which they now receive out of the joint all-rail rate (R. 129), there is no basis for the railroads' apprehension that establishment of the joint rate would require them to accept less than their "present revenue" of $2.95 on ex-barge traffic (R. 111; see R. 104). Indeed, inasmuch as no sulphur has moved at all by barge from the Galveston mines to Danville during the last five years, it is apparent that the railroads today are receiving no "present revenue" from this traffic. As long as the Danville railroads receive the same compensation for performing the same transportation service,[17] it cannot be material to them whether the antecedent journey of the goods which they transport was by rail or by barge. Cf. *Mechling* case, *supra*, pp. 577, 581–583. On the record in this case, the conclusion seems inescapable that the Danville railroads' refusal to establish joint rail-barge rates was dictated primarily by a desire to protect the connecting rail carriers from barge competition. The Act, however, does not give the railroads the life-or-death power over barge lines which would result if the decision whether to establish joint rail-barge rates lay solely in the railroads' discretion.

[17] The barge carriers proposed to absorb the cost of interchanging the sulphur with the railroads at East St. Louis (R. 84).

The Commission in its report did not even discuss whether the railroads' refusal to establish joint rates with appellants while maintaining such rates with the rail carriers constituted a discrimination in rates between connecting lines prohibited by Section 3 (4). Instead, it dismissed the issue of discrimination with the statement (R. 31, 32) that the basis of the alleged discrimination was the railroads' acceptance of a division on the ex-rail traffic which was less than the local rate which they charged for ex-barge traffic, and that a division of a joint rate is not a rate or charge under Section 3 (4). Appellants' complaint before the Commission (R. 63–64), however, was not thus limited, but specifically alleged that the railroads' refusal to establish joint rates with the barges, while maintaining such rates with other railroads, constituted a discrimination in rates and charges in violation of Section 3 (4), and appellants' counsel stated at oral argument before the Commission that he was continuing to press that contention (R. 126; see R. 147). The issue whether the railroads' refusal to establish joint rail-barge rates thus was squarely before the Commission, and the latter was required to decide it. And, as we have shown, refusal to establish such rates constituted a clear case of illegal discrimination.

Since we think that the railroads' refusal to establish joint rates with appellants constituted a discrimination in rates between connecting lines,

we find it unnecessary to reach appellants' question whether the railroads' acceptance of a division of the ex-rail rate which is less than the local rate charged for ex-barge traffic constitutes a discrimination in rates or charges prohibited by Section 3 (4).

CONCLUSION

The Commission erred in failing to establish through rail-barge routes and joint rates. The judgment of the district court upholding the Commission's order should be reversed, and the case remanded to the Commission for further appropriate proceedings.

Respectfully submitted.

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